Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:2:POSTF-159477-01
AKozoulina

date: 12/19/01

to: Paul Rinaldi, Territory Manager, Branch 8
Attention: Cliff Horowitz, Revenue Agent, Group 1646

from: Area Counsel, LMSB
(Financial Services)

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subject: **Consent to Extend the Statute of Limitations on assessment for Tax Year ending December 31, [redacted].**

Statute of Limitations Expires: [redacted]
Taxpayer: [redacted]
EIN: [redacted]
Years: [redacted]
U.I.L. Nos. 6501.08-00, 6501.04-00, 6501.04-05, 6501.04-11

This memorandum responds to your request for assistance dated October 30, 2001. This memorandum should not be cited as precedent. Specifically, you have asked our office to provide the appropriate language to be used on a Form 872, Consent to Extend the Statute of Limitations on Assessment, for [redacted] ("[redacted]") for the taxable year [redacted].

Issues

1. Whether the name of the taxpayer on the original or on the superseding return should be used on the Form 872, Consent to Extend the Statute of Limitations on Assessment.

2. Whether the statute of limitations on assessment started to run when the original return was filed ([redacted]), or when the superseding return was filed ([redacted]).

3. Whether [redacted] is the proper party to sign Form 872, Consent to Extend the Statute of Limitations on Assessment, being a parent of a group of subsidiaries filing a consolidated tax return.

Conclusions

1. The name of the taxpayer on the superseding return, which was filed on [redacted], is the name to be used on the Form 872,

Consent to Extend the Statute of Limitations on Assessment. Accordingly, the Form 872 should be captioned "[redacted] and Subsidiaries (formerly [redacted]) (E.I.N. [redacted]."

2. The statute of limitations started to run on [redacted] the date [redacted] filed its original tax return.

3. Yes, [redacted] is the proper party to sign Form 872, Consent to Extend the Statute of Limitations on Assessment, being a parent of a group of subsidiaries filing a consolidated tax return.

Facts

[redacted] ("[redacted]") (E.I.N. [redacted]) is a public corporation, and one of the world's [redacted], with a [redacted] of more than [redacted] including [redacted], and [redacted]. It operates in the licensing, [redacted] and [redacted] businesses in both domestic and international markets.

[redacted] was incorporated in Delaware on [redacted] under the name of [redacted] (E.I.N. [redacted]), and changed its name to [redacted] on [redacted] as a part of an acquisition of [redacted] (E.I.N. [redacted]) ("[redacted]"). After the acquisition, [redacted] retained its EIN. Prior to the acquisition, [redacted], including a group of subsidiaries, filed a consolidated tax return, and had a calendar tax year.

[redacted] filed a voluntary petition for bankruptcy protection in [redacted] and was under the protection of the U.S. District Court for the District of Delaware. On [redacted], [redacted] (under the name of [redacted]) acquired [redacted], and in order to do this, [redacted] (under the name of [redacted]) established a transitory entity called [redacted] acquired [redacted] by a taxable purchase and [redacted] was subsequently merged down into [redacted], with [redacted] being the surviving entity. The acquisition was a part of [redacted]'s [redacted] Amended Joint Plan of Reorganization that was confirmed by the U.S. District Court of Delaware. On the date of the acquisition, [redacted] changed its name to [redacted]. Before the acquisition, [redacted] had filed non-consolidated corporate income tax returns, Form 1120. As a result of the merger, [redacted] and its subsidiaries became a wholly-owned subsidiary of [redacted].

For the taxable year ending [redacted], the year of the acquisition of [redacted], [redacted] filed Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, on [redacted], which sought to extended the time for filing the [redacted] tax return until [redacted]. Form 7004 was filed in the name of

[redacted] and Subsidiaries with the E.I.N. [redacted] (which belongs to [redacted]) and listed as members of the affiliated group [redacted] for [redacted] months, and [redacted] with its subsidiaries for the last [redacted] months of [redacted]. Included at the top of the list was [redacted] under its proper EIN. [redacted] appeared on the list under its correct EIN. The taxpayer explained that the use of [redacted]'s EIN on Form 7004 was an error. Such extension was not recorded on a transcript of [redacted]'s account with the Service. There is no evidence that the extension was returned to the taxpayer as being an improper extension.

Next, on [redacted], [redacted] filed a [redacted] non-consolidated return, Form 1120 U.S. Corporation Income Tax Return, in the name of [redacted] (formerly [redacted]) with the E.I.N. of [redacted] and showing negative taxable income of ($[redacted]). Simultaneously, on [redacted], [redacted] filed Form 1139, Corporation Application for Tentative Refund for taxable year [redacted] with the E.I.N. [redacted], seeking to carry back net operating losses of $[redacted] to its [redacted] tax year. The Service paid such refund for the tax year [redacted] on [redacted].

Finally, on [redacted] (within the extension period for filing its [redacted] return), [redacted] filed a superseding [redacted] return, Form 1120, in the name of [redacted] and Subsidiaries (formerly [redacted]) under E.I.N. [redacted]. This return was a consolidated return and included all the financial and tax information related to [redacted] and its subsidiaries for the period from [redacted] to [redacted]. The superseding tax return showed negative taxable income of ($[redacted]). Attached to this return was Form 851, Affiliation Schedule, listing all of the subsidiaries that had previously filed as a consolidated group with [redacted]. Also attached were Forms 1122, Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return, executed by each subsidiary and consenting to be a part of a consolidated tax return for the period from [redacted] to [redacted].

Also on [redacted], [redacted] filed its Form 1120, Consolidated Income Tax Return, for [redacted] months of the taxable year [redacted] (ending [redacted]).

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon.

You should be aware that, under routing procedures which have been established for opinions of this type, our memorandum is referred to the National Office of Chief Counsel for review.

Discussion

Issue 1:

Under a line of cases, rulings, and regulations exemplified by the case Haggar Co. v. Helvering, 308 U.S. 389 (1940), a timely amended return is generally treated as the taxpayer's "return" for the purpose of most I.R.C. sections. See, Haggar at 395-96. The corrections provided in a timely amended return are in effect incorporated into, and treated as relating back to, and modifying or superseding the original return. The rule was applied to include amendments filed within the time for filing original returns as extended. See, Lerner Stores Corp. v. Commissioner, 118 F.2d 455 (2nd Cir. 1941); A.J. Crowhurst & Sons, Inc. v. Commissioner, 109 F.2d 131 (3rd Cir. 1940).

In contrast, an amended return which is filed late, after the due date (including extensions), is a nullity, and does not incorporate anything into the original return. See, Badaracco v. Commissioner, 464 U.S. 386 (1984); WM. B. Scaife & Sons Co. v. Commissioner, 117 F.2d 572 (3rd Cir. 1941).

The rule formulated in Haggar applies to a broad range of Code sections. See, Charles Leich & Co. v. United States, 329 F.2d 649 (Ct. Cl. 1964) (excess profits tax election made on a timely amended return will be a part of a "return"); National Lead Co. v. Commissioner, 336 F.2d 134 (2d Cir. 1964) (inventory accounting relief election made on a timely amended return will be a part of a "return"); Rev. Rul. 78-256, 1978-1 C.B. 438 (tax shown on the timely amended return is the amount for the purposes of estimated tax payments). Any return filed prior to the due date and changing the data reported on the original return is called a superseding return. See, IRM 7.3.1. Ch.5.15.

Before applying this rule to our case involving a consolidated return, we have to determine first, whether the Form 7004 was a valid extension of time for filing the return, and second, whether the consolidated return was filed in accordance with the regulations related to consolidated returns.

First, we think that the Service should not challenge the validity of the Form 7004 filed by [redacted]. Generally, under Treas. Reg. 1.6081-3(b), the extension shall be considered as granted to the affiliated group for the filing of its consolidated return or for the filing of each member's separate return, if Form 7004 is timely (before the due date for the filing of a tax return by the parent) filed by the common parent with the internal revenue officer with which the parent corporation filed its income tax return. To

be valid, such Form 7004 should include a statement listing the name and address of each member of the affiliated group for which such consolidated return will be made, and also should be accompanied by the remittance of the amount of the properly estimated unpaid tax liability. Treas. Reg. §§ 1.6081-3(a)(3) and (b).

In our case, although the EIN used on the Form 7004 did not belong to [redacted] and subsidiaries, the form correctly identified the name of the taxpayer and its address. The form also correctly listed the names, addresses, and EINs of each member of the affiliated group (including [redacted]), was signed by the same officer authorized by the parent corporation to sign tax returns of the parent corporation, and was filed on time. There was no unpaid estimated tax liability since the taxable income of the group was negative. Most important, after the Service received Form 7004, there is no evidence that it handled the form as an improper extension, and after Form 1139 was filed, paid the refund. Therefore, we think that since Form 7004 sufficiently identified the taxpayer and substantially complied with the requirements for the filing of such forms, the Service should not challenge now the validity of such extension. Therefore, inclusion of [redacted]'s EIN on the Form 7004 instead of [redacted]'s EIN should be regarded as a non-fatal error.

Second, the consolidated return filed on [redacted], was filed in accordance with all of the regulatory requirements. Treas. Reg. 1.1502-75 allows a group which files a consolidated return for the first time, to file a consolidated return in lieu of separate returns for the taxable year not later than the due date (including extensions of time) for the filing of the common parent's return. To be valid, such consolidated return should be filed by a common parent, include Form 851, Affiliations Schedule, and should have attached Forms 1122, Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return, for any part of the taxable year for which the consolidated return is to be filed.

In our case, the consolidated return filed on [redacted] in the name of [redacted] & Subsidiaries (formerly [redacted]) (E.I.N. [redacted]), was filed by the common parent, included Form 851, listing all subsidiaries, and had attached Forms 1122, executed by each subsidiary.

Since the Form 7004 should be considered a valid extension, and the consolidated return filed on [redacted] met all the requirements for filing consolidated tax returns by the group for the first time, such return was a superseding return under the rule formulated in the Haggar case. In other words, the superseding return is the taxpayer's true return, and all the information

reported in such superseding return, including the name of the taxpayer, is treated as the only information provided by "the return." Similarly, under Rev. Rul. 56-67, 1956-1 C.B. 437, "a consolidated return may properly be filed on or before the due date, notwithstanding the earlier filing of separate returns."

Therefore, in order to extend the statute of limitations on assessment for the taxable year [redacted], the name of the taxpayer as it was used on the superseding return should be used on the Form 872, Consent to Extend the Statute of Limitations on Assessment.

Accordingly, Form 872 should be captioned as follows:

"[redacted] and Subsidiaries (formerly Toy Biz, [redacted])(E.I.N. [redacted])."

Issue 2:

The general statute of limitations for the assessment of tax is found in I.R.C. § 6501(a), which states that, except as otherwise provided, tax must be assessed within 3 years after "the return" was filed, whether or not "such return" was filed on or after the date prescribed. Under I.R.C. § 6501(b)(1), a return filed before the last day prescribed for filing is deemed filed on the last day. However, a return filed on extension is treated as filed on the day it is received, in the case of a return received on or before the extended due date, or on the postmark date, in the case of a return mailed before but received after the extended due date. See, First Charter Financial Corp. v. United States, 669 F.2d 1342 (9th Cir. 1982).

The question in our case is whether the originally filed return or the superseding return is "the return" for the purposes of § 6501(b)(1). In other words, when the statute of limitations on assessment started to run with regard to [redacted], on [redacted] or on [redacted].

Treas. Reg. 1.1502-75(g), which describes the computation of the period of limitations with regard to consolidated tax returns, does not clarify the particular situation that we have in our case. For example, Treas. Reg. 1.1502-75(g)(2) considers the situation where income is incorrectly included in separate returns, but only if a consolidated return is required for the taxable year (because it has been filed by the group for the immediately preceding taxable year). Under such circumstances, the filing of separate returns by a member of the group for such year shall not be considered as the making of a return for the purpose of computing any period of limitation with respect to such consolidated return, unless there is an attached statement setting forth the reasons for the group's belief that a

consolidated return is not required. Treas. Reg. 1.1502-75(g)(2). This regulation does not apply to our case where the consolidated return with a new common parent was filed for the first time.

Under Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934), an original return, despite its inaccuracy, was found to be a "return" for limitations purposes, so that the timely filing of a superseding return did not start a new period of limitations running. The court held that "... a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation does not toll a limitation which has once begun to run." See, Zellerbach at 180. This principle was further developed in Haggar, and has been followed in the context of the statute of limitations on refunds in I.R.C. § 6511. See, e.g., Kaltreider Construction, Inc. v. United States, 303 F.2d 366 (3rd Cir. 1962), cert. den., 371 U.S. 877 (1962); Rev. Rul. 72-311, 1972-1 C.B. 398; Section 6501 - Limitations on Assessment, 98 TNT 177-60, SCA 1998-024.

On the other hand, in Cem Securities Corporation v. Commissioner, 72 F.2d 295 (4th Cir. 1934), the court held that a return which failed to substantially comply with the main purpose of the return, namely, to state the items of income, deductions, and credits for some particular taxpayer, did not set in motion the running of the period of limitations. 72 F.2d at 299.

Although one may argue that under Cem Securites, the original return of [redacted] did not substantially comply with the requirements to consolidated returns, we think that the Service should defend the earlier filing date of the return under Zellerbach for practical reasons. Even though the subsidiaries were not included into [redacted]'s original return of [redacted], the Form 7004 evidences that the subsidiaries had planned to file the consolidated return at least on [redacted]. Therefore, it would not be unfair to the subsidiaries if the statute of limitations with regard to "[redacted] and Subsidiaries" started running earlier than the filing date of the consolidated return, but later than the date of Form 7004. In addition, it is to the disadvantage of the Service, and to the advantage of the taxpayer, that the Service chooses to defend the earlier filing date for the purpose of the statute of limitations.

This office contacted Ms. Inga Plucinski, an attorney with Procedure and Administration in the National Office, to discuss this issue. Ms. Plucinski agreed with our conclusion that the Service should defend the earlier filing date of the return for practical reasons. However, she emphasized that this conclusion reflects specific circumstances of this case, and the Service may apply the Cem Securites to another set of facts.

Therefore, it is our opinion that in this case, the rule of Zellerbach applies, and the [redacted] statute of limitations for assessment started running on [redacted], at the time when [redacted] first filed its original return.

Issue 3:

Pursuant to Treas. Reg. 1.1502-77(a), the common parent of a group of affiliated corporations filing a consolidated income tax return for a particular consolidated return year is the sole agent for each member of the group and, as such, is authorized to act in its own name in all matters relating to each group member's income tax liability for its tax year included in that consolidated income tax return. Pursuant to Treas. Reg. 1.1502-77(c), unless there is an agreement to the contrary, a Form 872 entered into by a group's common parent for a particular consolidated return year will apply to extend the period of limitations on assessment of income tax for the tax year of each group member included in that consolidated return.

Further, under Treas. Reg. 1.1502-77(a), a consolidated group's common parent for a particular consolidated return year remains the sole agent for the other members of the group for such year so long as the common parent continues its corporate existence, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. 1.1502-77(a)(1); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985).

In our case, [redacted] continues to exist as the common parent of the affiliated companies with which it filed a consolidated return in [redacted]. Based on the foregoing, [redacted] remains the appropriate entity to execute a Form 872, Consent to Extend the Statute of Limitations on Assessment, with respect to itself and the affiliated companies with which it filed a consolidated return.

Neither I.R.C. § 6501(c)(4) nor the regulations thereunder specify who may sign consents. The Service, therefore, applies the rules applicable to the execution of original returns to the execution of Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Under I.R.C. § 6061, any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. In the case of corporate returns, I.R.C. § 6062 and Treas. Reg. 1.6062-1 provide that a corporation's income tax return shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation.

Therefore, any such officer of [redacted] is authorized to sign Form 872. The best person to sign on behalf of [redacted] should be [redacted], who signed both [redacted]'s original and superseding tax returns for the taxable year [redacted].

PROCEDURAL CONSIDERATIONS

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928 (DO) as a follow-up letter to Letter 907 (DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of these letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. 301.6501(c)-1(d) and IRM Handbook No. 121.2.22.5.10. The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. The notification must be made to the taxpayer by: 1) sending or presenting Letter 907(DO), and 2) sending or presenting Publication 1035 "Extending the Tax Assessment Period" to the taxpayer when soliciting the Form 872. You should document your actions in this regard in the case file (Form 9984). See, IRM Handbook No. 121.2.22.3.

Although § 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in the case file.

If you have any questions, telephone Anna Kozoulina of our office at (212)436-1503.

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unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By:_____
ANNA KOZOULINA
ATTORNEY, LMSB-2